Jardine, Logan & O'Brien, P.L.L.P.

# JLO legal • ease

Winter 2011

Qualified Litigation Attorneys

## Ten Percent Prejudgment Interest under Minnesota Statute § 60A.0811 Can be in Excess of the Policy Limits and Does Not Require a Finding of Bad-Faith

**by Darwin S. Williams**

When determining whether to settle or proceed to trial on a claim by an insured that the insurer has breached a duty under a commercial or professional insurance policy[1], one factor that should be considered is the prevailing insured's entitlement to ten percent (10%) per annum prejudgment interest.

Since August 1, 2009, under Minnesota law, "an insured who prevails in any claim against an insurer based on the insurer's breach or repudiation of, or failure to fulfill, a duty to provide services or make payments is entitled to recover ten percent per annum interest on monetary amounts due under the insurance policy." *See* Minn. Stat. § 60A.0811, subd. 2 (2011).

This statute expressly defines an insured as "any named insured, additional insured, or insured under an insurance policy." For those litigating large construction defect claims, this broad definition arguably includes a general contractor who has been included as an additional insured or an additional named insured under the subcontractor's general liability policy.

The controlling case regarding the application of ten percent prejudgment interest is *Owatonna Clinic-Mayo Health System v. Medical Protective Co. of Fort Wayne, Indiana*, 714 F.Supp.2d 966 (D. Minn. 2010). U.S. District Court Judge David Doty held that the statute applied to "any claim" for breach of duty to make payments on which the insured prevailed. According to Judge Doty, the term "any claim" was clear and not susceptible of interpretation or limitation. Thus, it encompassed a claim equaling a policy's liability limit. Further, Judge Doty found that the plain meaning of the phrase "on monetary amounts due under the insurance policy" indicates that the interest is in addition to the amount due under the policy. Thus, in the Owatonna Clinic case, the insured was entitled to ten percent per annum interest on the full indemnity due under the policy (i.e. in addition to the policy limits). Per the statute, this ten percent interest was calculated from the date the request for payment of the benefits was made to the insurer.

Under Minnesota law, an insurer has a duty to exercise good faith when it assumes control over the right of settlement of claims against an insured. *See Short v. Dairyland Ins.*, 334 N.W.2d 384 (Minn. 1983). If the insurer fails in its duty to act in good faith, it may become liable to indemnify the insured in excess of the policy limits and is subject to a separate cause of action and consequences.[2] *See Short*, 334 N.W.2d at 387-88; and Minn. Stat. § 604.18. In the Owatonna Clinic case, the court "predicted that the Minnesota Supreme Court would not require a separate finding of bad faith to compel an insurer to pay prejudgment interest in excess of policy limits" because the "necessary implication" of the phrase "any claim" is to abrogate a bad-faith requirement "when an insured prevails against a commercial insurer in a claim for breach of a duty to provide services or make payment."

The court in the Owatonna Clinic case held that prejudgment interest under Minn. Stat. § 60A.0811 serves both a compensatory and a penal purpose. This is significant because prejudgment interest under Minn. Stat. § 549.09 expressly forbids an award under that section when interest is "otherwise provided by contract or allowed by law." Thus the Owatonna Clinic case appears to bar an insured from obtaining double interest under both Minn. Stat. §§ 549.09 and 60A.0811. *See Burniece v. Illinois Farmers Ins. Co.*, 398 N.W.2d 542 (Minn. 1987) (holding that an insured was not entitled to both the interest on overdue basic economic loss benefits under Minn. Stat. § 65B.54, subd. 2 and prejudgment interest under § 549.09).

Finally, Judge Doty noted that one of the public policies behind the statute is to encourage settlements by creating an incentive for a commercial insurer to resolve insurance coverage disputes quickly. This incentive can be especially significant when you are faced with a large value claim and a lengthy litigation period.

**10% Interest** *continued on page 3*

IN THIS *issue*



### Subscription Information

A *referral* is the best compliment you can give an attorney. If you know of anyone who may be interested in receiving this newsletter, please complete the section below and return it via fax to 651-223-5070. You may also use the section below for a change of address, etc. Alternatively, you may e-mail the information to us at jlolaw@jlolaw.com.

Name:
Company:
Address:
City:
State/Zip:
Phone:
E-mail:



*Comments or inquiries may be directed to Shannon Banaszewski.*

## What Does Preserving Electronic Data Mean?

### by Jessica E. Schwie

An incident has occurred (a motor vehicle accident, termination of an employee, an explosion) and the smell of a lawsuit is in the air. It is time to react - what happened, who did what, are there any pictures, etc. In other words, the persons involved in the incident, or their investigators, take action to preserve the evidence related to the incident. It is relatively easy to take photographs of a scene and preserve those for future litigation. The more nettlesome issues typically arise in the context of electronic (computer) data - preservation of flash drives, laptops, hard drives, etc.

Persons or entities who were involved in an incident that will likely lead to a claim and/or litigation have an obligation to preserve evidence. *See Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739 (8th Cir. 2004); *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003); and *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (Jonathan M. Redgrave, ed. 2004) (commonly relied upon and referred to by courts as "*The Sedona Principles*"). The obligation to preserve evidence begins the moment a person knew or should have known that the evidence may be relevant to future litigation. *See Stevenson*, 354 F.3d at 746.

A person should know to preserve evidence when:

1. An incident has occurred;
2. The incident involves death or serious injury (or, in cases of employment, termination);
3. The person knows based upon prior experience that a lawsuit is possible or even likely;
4. The person knows from prior litigation experience that certain evidence will be used in that lawsuit, and
5. The evidence is a contemporaneous recording of the facts and circumstances giving rise to the lawsuit.

*Id.*; *See also Northington v. H&M, Int'l,* 2011 U.S. Dist. LEXIS 14378 (N.D. Ill, 2011)(discussing what should have been the time period for implementing litigation hold in alleged wrongful termination case)(unpublished).

If evidence relevant to a claim is not preserved, the person or entity involved in the incident may suffer negative impacts in litigation. Courts may impose sanctions for failing to preserve evidence, such as attorneys fees and/or adverse jury instructions (e.g. advising the jury that a particular witnesses testimony should not be believed because he or she destroyed certain evidence). *See* Fed. R. Civ. P. 37(e), Minn. R. Civ. P. 37; *Rockwood v. SKF USA, Inc.*, 2010 U.S. Dist. LEXIS 108792 (D.N.H. 2010)(allowing adverse inference to be drawn against a business owner's credibility as a witness because he altered the contents of his hard drive two days after being ordered to produce the hard drive for mirror imaging)(unpublished). If the evidence that was destroyed was crucial to the decision of whether a person should be held liable for something that he or she did, or did not do, at the time of the incident, a court may even dismiss the claim because the crucial evidence was not preserved. *See Patton v. Newmar Corp.*, 538 N.W.2d 116 (Minn. 1995) (appropriate sanctions may include the prohibition of arguing a particular issue - effectively eliminating a plaintiff's claims.); and *Fischer v. Rheem Mfg. Co.*, No. 01-1739, 2004 U.S. Dist. LEXIS 8616 (D. Minn. 2004) (same).

In order to avoid sanctions, legal counsel began sending letters to their clients, asking them to preserve evidence for the pendency of the litigation. The letters are commonly referred to as a "litigation hold." Because litigation holds were not always delivered to persons holding relevant evidence, legal counsel, at the urging of the courts, are expected to meet with their client early on in litigation to identify the key witnesses and the evidence, particularly the electronic/computer evidence held by the key witnesses. *See 3M Innovative Props. Co. v. Tomar Elecs.*, 2006 U.S. Dist. Lexis 80571 (D. Minn. 2006)(imposing sanctions where litigation hold did not reach key witnesses and relevant e-mails were deleted). Litigation counsel, including this firm, are well versed in identifying what evidence exists and where it is stored. Now the question is how should it be "preserved"? In other words, how should it be stored for the duration of the claim or litigation?

Some courts have defined preservation "to be broadly interpreted to accomplish the goal of maintaining the integrity of all documents, data, and tangible things reasonably anticipated to be subject to discovery" and to include taking reasonable steps to prevent the partial or full destruction, alteration, testing, deletion, shredding, incineration, wiping, relocation, migration, theft or mutation of such material, as well as negligent or intentional handling that would make the material incomplete or inaccessible." *See United Medical Supply Company, Inc. v. United States*, , 73 Fed. Cl. 35 (U.S. Fed. Cl. 2006). Applying this definition, holding onto printed photographs is relatively easy.

Most litigation now, however, involves at least some evidence in the form of computer data - E-mails, Word documents, Facebook pages, etc. *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. MD 2010)(discussing the regularity of "ESI" electronically stored data and advocating for more stern sanctions for attempts to destroy the same). Much of this data can be easily deleted through programs such as automatic delete functions of Outlook or by running a program for the purposes of "freeing up space" such as CCleaner, Darik's Boot and Nuke. In fact, there is a fair amount of case law discussing whether a party should be sanctioned for allowing data to be destroyed by such programs. *See Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010)(discussing sanctions in the context of the deletion of e-mail pursuant to automatic deletion policy adopted by city); *Rockwood v. SKF USA, Inc.*, 2010 U.S. Dist. LEXIS 108792 (D.N.H. 2010) (discussing possibility of sanctions where party used CCleaner, which has a deletion component, to improve operation of laptop of a key witness). The question is then how should the computer evidence be stored for the pendency of the litigation and/or claim processing?

Methods of storage for computer data have included:

1. Removing a device from use (e.g. storing a hard-drive or laptop on a shelf);
2. Continuing to use a device, but suspending automatic delete functions (e.g. allowing an employee to continue using a lap-top, but change Outlook e-mail deletion settings to prevent automatic deletion of e-mails past a certain date);
3. Creating a mirror-image of the hard drive. (e.g. True Image from Acronis or Redundant Array of Independent Disks);
4. Storing the data to a backup tape or another (external) hard-drive; and
5. Storing the data to a virtual data room, in a cloud and its virtual server, or other virtual/off-site system (e.g. www.firmex.com, www.seagate.com, www.microsoft.com).

The foregoing methods of storage and any others utilized present three primary issues: (1) is the method of storage secure; (2) how much does it cost; and (3) when it comes time to producing the data in what format will it (or can it be) produced. *See Best Buy Stores, L.P. v. Developers Diversified Realty Corp.*, 247 F.R.D. 567 (D. Minn. 2007) (database cost $27,000.00 per month to maintain); and *Doe v. Norwalk Community College*, 248 F.R.D. 372 (D.Conn. 2007)(computers needed to be put into use by other employees).

For example, it is often relatively cheap to simply instruct witnesses that they can continue using the laptop that contains relevant data; but that they cannot delete, alter or transfer relevant

**10% Interest** *continued from page 1*

[1] Excluding the following types of insurance policies: workers' compensation, health insurance, life insurance, disability insurance, and policies issued by a township mutual fire insurance company or farmers mutual fire insurance company operating under Minnesota Chapter 65A or 67A.

[2] The full extent of the damages for a successfully made bad-faith claim are not the subject of this article, but they are significant and can include pre-judgment interest, post-judgment inters, taxable costs, and an amount equal to one-half of the proceeds awarded in excess of a Minnesota Rule 68 offer and reasonable attorney fees actually incurred to establish bad faith. •

**Electronic Data** *continued from p. 2*

documents and evidence. While this method is cheap and evidence might be preserved in this fashion, it is not uncommon for evidence to be lost utilizing this method, even if inadvertently. Hard-drives and servers can crash. *See Thompson v. Jiffy Lube Int'l., Inc.*, 505 F.Supp.2d 907 (D. Kan. 2007)(evidence on laptop was lost when computer crashed and could not be restored); *Inventory Locator Serv., LLC v. Partsbase, Inc.*, 2005 U.S. Dist. LEXIS 4625 (W.D. Tenn. 2005)(evidence stored on server was lost when server was cleaned because of crashes/slows in the system and back-up tape was taped over pursuant to automatic re-write procedure)(unpublished). Depending on the manufacturer, the average service life of a hard drive is usually given as "5 years or 20,000 hours." *See* generally Seagate.com (discussing service life, failure rates, shock resistance, etc of hard-drives manufactured by them). In addition, computers, laptops, hand-held devices, etc. are all susceptible to normal hazards such as water, fire, static electricity, and magnets.

Alternatively, if the hard-drive is put into non-use and/or removed and placed on a shelf for preservation, its quality decreases significantly. Hard drives have mechanical components that require ongoing operation or data loss may occur. In addition, other major factors affecting drive-life include: magnets, vibration and shock, and temperature and humidity. Moreover, some hard drives associated with surveillance programs may have the ability to re-write themselves even when unplugged. *See Salamey v. Berghius*, 2010 U.S. Dist. LEXIS 89800 (E.D. Mich 2010)(discussing sanctions where police confiscated hard drive from surveillance system and then stored the hard drive unplugged without knowledge that the system would continue to rewrite and thus destroy the data)(unpublished).

Because computer data can be easily lost, parties who have made some effort to create redundant copies of the data generally escape sanctions for lost evidence. *See E*Trade Secs. LLC v. Deutsche Bank AG*, 230 F.R.D. 582 (D. Minn. 2005)(limiting sanctions where lost computer data was at least stored in paper format); *Inventory Locator Serv., LLC v. Partsbase, Inc.*, 2005 U.S. Dist. LEXIS 4625 (W.D. Tenn. 2005) (refusing to impose sanction, although evidence was lost when server was cleaned, the I.T. staff had burned CD/DVDs of the data at the time of the initial demand for the data). However, when parties begin looking at creating redundant copies of the data (e.g. through mirror imaging of the hard drive) or placing data in a virtual data room, the costs of creating redundancy can be prohibitive.

Whether printing out paper copies, burning CD/DVDs, copying data to flash drives, creating mirror images, or storing data to a virtual data room there are fixed costs (e.g. the cost of paper or CDs) and business interruption costs. *See Piccone v. Town of Webster*, 2010 U.S. Dist. LEXIS 92409 (W.D.N.Y. 2010)(considering motion order mirror imaging of hard drive and whom should be responsible for the associated costs); and *Balboa Threadworks, Inc. v. Stucky*, 2006 U.S. Dist. LEXIS 29265 (D. Kan. 2006)(considering business interruption costs as part of ordering a mirror imaging process). Courts recognize these difficult issues, but the issues cannot be resolved through a bright-line test; such as ordering all parties to mirror image all hard-drives that might contain relevant data.

Rather, when reviewing the preservation methods of a party, courts generally engage in a balancing test that takes into consideration the totality of the circumstances related to the electronic data. Courts, thus, consider the claims at issue, where the data is stored, is there a business need to continue using the computer device (e.g. continued use of cell phone), can the data be copied, how expensive is it to make a copy, as to the type of copy made, does the copy retain pertinent information (such as the creation data, access data, last printed date), and whether the data be produced in a usable form during litigation. *See 3M Company v. Kanbar*, 2007 U.S. Dist. LEXIS 45232 (N.D.Cal. 2007) (party ordered to produce data in electronic format rather than converting electronic data into hard copy format for purpose of burying opposing counsel in paper); *Scotts Company LLC v. Liberty Mutual Insurance Co.*, 2007 U.S. Dist. LEXIS 43005 (S.D. Ohio 2007)(holding that documents had to be produced in a manner that permitted any opportunity to review the metadata). In order to protect themselves from sanctions, parties should engage in the same thought process and document the items that they took into consideration. Evidence of a meeting and a meaningful discourse on what measures should be taken to preserve evidence will bode well for any party whose preservation methods are challenged in the future. •

## Firm News

It is with pleasure that the Firm announces that **Jessica E. Schwie** became a partner with the Firm as of January 1, 2011. •

The Firm welcomes new associates **Daniel M. Gallatin, Vicki A. Hruby** and **Michael P. Goodwin**. •

On January 13, 2011, the Minnesota Supreme Court appointed **Lawrence M. Rocheford** to the Board of Legal Certification. •

## Case Law Update

### An Insurer's Offer to Repair - Not Replace - a Roof Did Not Lack a Reasonable Basis Under Minnesota's Good Faith Statute

**By Darwin S. Williams**

A recent Order by U.S. District Court Judge Joan Ericksen concluded that the facts surrounding a specific insurer's offer to repair, but not replace, an insured's roof did not show an absence of a reasonable basis for denying benefits. *See Davis v. Grinnell Mut. Ins. Co.*, 09-2563, Dec. 30, 2010.

Partial summary judgment was granted to the insurer because a claim under Minnesota's relatively new Good Faith Statute (Minn. Stat. § 604.18 - Insurance Standard of Conduct) requires a showing of the lack of a reasonable basis for denying benefits that is known or that is attended by a reckless disregard for the lack of a reasonable basis.

In this particular case, the insurer originally told the insured that his hail-damaged cedar-shake roofs would all be replaced. A later evaluation of the roofs by the insurer indicated that there was hail damage to less than 1% of the shingles and that the roofs would be repaired rather than replaced. The court concluded that, under the circumstances of this case, a reasonable juror could not find that a decision to repair rather than replace the roofs lacked a reasonable basis.

The insurer's motion for summary judgment was limited to the bad faith claim. That motion was granted and that claim was dismissed. Other issues, including the issue of whether the insurance contract was breached by the insurer's decision, were left for trial. •

## JLO *legal • ease*

**Jardine, Logan & O'Brien, P.L.L.P.,** is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients.

## About The Authors


### Jessica E. Schwie

jschwie@jlolaw.com
651-290-6591


Jessica is a partner with Jardine, Logan & O'Brien, P.L.L.P. Ms. Schwie practices in all areas of civil litigation with an emphasis in municipal law. Jessica graduated in 1999 from Hamline School of Law. For additional information, please see her biography at www.jlolaw.com


### Darwin S. Williams

dwilliams@jlolaw.com
651-290-6503


Mr. WIlliams is a senior associate at Jardine, Logan & O'Brien, P.L.L.P., and practices in the areas of construction law, general liability/negligence, motor vehicle and government liability. Darwin is a 2005 graduate of the University of St. Thomas School of Law, and is currently the Chair of the Minnesota State Bar Association Professionalism Committee.

### Coming in the Spring 2011 Issue...

*Spoliation*

*Pleading the 5th Amendment*

**If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.**


JARDINE
LOGAN &
O'BRIEN
ATTORNEYS AT LAW
P.L.L.P.

Suite 100
8519 Eagle Point Boulevard
Lake Elmo, MN 55042